

## United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 1814	DATE	1/27/2003
CASE TITLE	Smith vs. Walls		

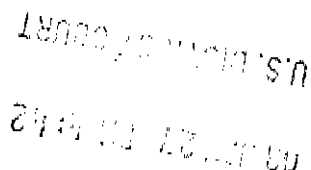

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

## MOTION:

## DOCKET ENTRY:

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] Smith's petition for a writ of habeas corpus is denied and the case is terminated. Enter Memorandum Opinion and Order. Any pending motion in this case is terminated as moot.

- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court.	 U.S. District Court Northern District of Illinois 274 1/2 N. Dearborn St. Chicago, IL 60610-4412	4 number of notices	Document Number
<input type="checkbox"/> No notices required.		JAN 28 2003 date docketed	88
<input checked="" type="checkbox"/> Notices mailed by judge's staff.		 docketing deputy initials	
<input type="checkbox"/> Notified counsel by telephone.		1/27/03 date mailed notice	
<input type="checkbox"/> Docketing to mail notices.			
<input checked="" type="checkbox"/> Mail AO 450 form.			
<input type="checkbox"/> Copy to judge/magistrate judge.			
MPJ	courtroom deputy's initials	Date/time received in central Clerk's Office	

**DOCKETED**  
**JAN 28 2003**

No. 00 C 1814

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On March 19, 1997, while his direct appeal was still pending, Mr. Smith filed a bare-bones petition for post-conviction relief under the Illinois Post-Conviction Hearing Act ("IPCHA"), 725 ILCS 5/122-1 *et seq.* At the same time, he also filed a motion for extension of time to file "'post-conviction and attached exhibits due 4/28/97,'" claiming that the prison was on lockdown and he needed proof of a court deadline to gain access to the law library." On May 30, 1997, the Circuit Court dismissed his petition as frivolous and without merit because he had "failed to attach any documentation to his petition which supported [his] conclusory allegations." The Illinois Appellate Court affirmed the dismissal on September 8, 1997, and his petition for leave to appeal to the Illinois Supreme Court was denied on February 4, 1998.

On May 21, 1997, before Mr. Smith knew that his first petition had been denied, he mailed an amendment to his petition, setting forth specific allegations of constitutional violations. Mr. Smith's amended petition was not file-stamped until June 3, 1997, however, four days after the Circuit Court denied his initial petition as frivolous. On June 20, 1997, the Circuit Court summarily dismissed this amended petition as successive because it had already ruled on the initial petition. Mr. Smith moved the Court to vacate its judgment and reinstate his petition, but the Court denied his motion on July 16, 1997. Mr. Smith appealed, and

he was represented by counsel on appeal. He argued that the Circuit Court should have considered the amended petition as an amendment, not a successive petition. The Appellate Court affirmed the dismissal on April 30, 1999, denied rehearing on June 28, 1999, and Mr. Smith's petition for leave to appeal to the Illinois Supreme Court was denied on December 1, 1999.

On March 24, 2000, Smith filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging numerous constitutional flaws in his trial and conviction. I dismissed the petition as untimely, but that holding was reversed by the Seventh Circuit. On remand, I considered Mr. Smith's habeas petition on its merits, and denied it in part, and ordered further briefing on the merits of his ineffective assistance of counsel claims.

Respondent's supplemental response focuses exclusively on the argument that the Illinois Appellate Court's ruling that Mr. Smith waived these claims by raising them in an impermissible successive post-conviction petition constitutes an independent and adequate state ground for denying his claims. If so, this court would have no power to address the merits of Mr. Smith's claims. See *Coleman v. Thompson*, 501 U.S. 722 (1991).

My reading of the Seventh Circuit's opinion in this case suggests that respondent is correct. The holding in that case was that a post-conviction petition dismissed by the Illinois courts as successive may nevertheless be "properly filed" for purposes of

tolling the one-year statute of limitations period for federal habeas corpus claims. *Smith v. Walls*, 276 F.3d 340, 342 (7th Cir. 2002). The applicable statute states that "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILL. COMP. STAT. 5/122-3. The court explained that "a successive petition that is later dismissed as procedurally barred is 'properly filed' as long as it conforms to Illinois' formal filing requirements." *Id.* at 344. In other words, the claims in a "properly filed" petition may still be procedurally barred. The opinion gives no indication that the procedural bar is any less an independent and adequate state ground for dismissal because the barred claim operates to toll the statute.

Mr. Smith's second post-conviction petition was properly filed, but the Illinois Appellate Court affirmed its dismissal as successive. In the absence of evidence that Illinois applies 725 ILL. COMP. STAT. 5/122-3 in a "freakish" manner, that dismissal constitutes an independent and adequate state ground for denial of Mr. Smith's petition. *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990). If the state procedural rule is "firmly established and regularly followed," its application is not freakish. *Braun v. Powell*, 227 F.3d 908, 912 (7th Cir. 2000). Therefore, since at the state level Mr. Smith only fleshed out his ineffective assistance of counsel theories in a well-filed but procedurally barred successive petition, I cannot evaluate their

merits here, but must dismiss his petition for a writ of habeas corpus.

Smith's petition for a writ of habeas corpus is DENIED.

**ENTER ORDER:**

*Elaine E. Bucklo*

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**Elaine E. Bucklo**

United States District Judge

Dated: January *27*, 2003